IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.2172 OF 2004

IN

SUIT NO.2189 OF 2004

...

Sadruddin Khimji Bilawala ...Plaintiff

v/s.

Amirali Karmali Pradhan

and others. ...Defendants

...

Mr.Raithatta i/b RMG Law Associates for the Plaintiff.

Mr.S.A.Sawant for Defendants.

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CORAM: D.K.DESHMUKH, J.

DATED: 16TH JUNE,2005

P.C.:

1. By ad-interim order dated 4-2-2005, by consent of Plaintiff and Defendant No.1, Receiver has been appointed on the suit property i.e. a flat. The Defendant No.1 has also been directed as agent of the Court Receiver by consent of parties.

2. The entire debate before me was whether the Defendant No.1 who has been appointed as agent of the Receiver should be directed to pay royalty. The case of the Plaintiff is that the deceased by his Will has not bequeathed the property in favour of the Defendant No.1 who is the son of the deceased and therefore he does not have the right to occupy the property and therefore he should be made to pay royalty for occupying the flat. Perusal of the Will on the basis of which this suit has been filed shows that the deceased was the tenant of the rooms in the building. According to averments in the plaint, the building was owned by Defendant No.7. Defendant

No.7, according to averments in the plaint, transferred the building in favour of a Co.operative Society i.e. the Defendant No.3 in the year 1998 and that society issued a letter of allotment in the year 2002. The deceased admittedly expired on 20th December, 2000. Prima facie it appears that the legal position would be that initially the deceased was the tenant of Defendant No.7. On transfer of the building by Defendant No.7 in favour of Defendant No.3/society, the deceased would become tenant of Defendant No.3/society. Thus, when he died on 20th December, 2000 his status in relation to the rooms was that of a tenant. In terms of the provisions of the Bombay Rent Act, which was then in force, bequeath of tenancy right in relation to the premises to which the provisions of that Act apply is not possible. Therefore, the tenancy will be inherited by the heirs of the deceased. Defendant No.1 admittedly is one of the heirs. Ownership rights were required to be transferred by the Defendant No.3 society to a person who was holding the rooms as tenant. Therefore, as on the death of deceased in December, 2000 all his heirs inherited the tenancy. Allotment of ownership rights would be in favour of all the heirs, and the Defendant No.1 is admittedly

an heir, it cannot be said prima facie that he does not have any rights in relation to the suit premises. There are other heirs of the deceased than the Plaintiff, they have not yet come forward to claim any rights in relation to the property. They have also not been joined as parties to the suit. In the absence of other heirs being joined as parties to the suit, once court finds that on the basis of the Will the Plaintiff will not be entitled to claim the property, the suit would be dismissed without there being any threat to the rights of the Defendant No.1 to continue to be in possession of the flat.

3. In this situation, therefore, in my opinion, it will not be appropriate to direct the Defendant No.1 who is occupying the flat which is the residential premises to pay royalty considering the fact that he is son of the deceased. It is further to be seen here that even if ultimately the suit of the Plaintiff succeeds, the Plaintiff can claim an inquiry into the mesne profits and in case any decree of mesne profit is passed, the mesne profit can be recovered from the Defendant No.1.

4. Taking overall view of the matter, in my opinion,

it would not be appropriate to direct the Defendant No.1 who is presently occupying the property as agent of the Receiver, without any royalty, to pay royalty for occupying the property.

5. In this view of the matter, therefore, ad-interim order dated 4-2-2005 is confirmed. Defendant No.1 has been directed to be agent of the Receiver without royalty. The Plaintiff is also directed to pay costs of this motion to the Defendant No.1, as incurred by the Defendant No.1. Motion disposed of.

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